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December 19, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments on the Federal-State Joint Board's Recommended Decision on Universal Service -- CC Docket Number 96-45

Dear Secretary Caton:

Enclosed are an original and four copies of the American Public Power Association's reply comments on the Federal-State Joint Board's Recommended Decision on Universal Service.

We are also serving a copy on disk on Sheryl Todd, Federal Communications Commission, Common Carrier Bureau, 2100 M Street, N.W., Room 8611, Washington, D.C. 20554, and one copy to the International Transcription Service.

Kindly return a date-stamped copy to the messenger.

Sincerely,

James Baller

cc: Official Service List

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the	)	
Federal State Joint Board's	)	
Recommended Decision	)	CC Docket No. 96-45
on Universal Service	)	
	)	

To the Commission:

COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association commends the Federal-State Joint Board for its herculean efforts in fashioning its Recommended Decision on Universal Service. APPA believes that many of the Joint Board's recommendations have merit and that others could impede the statutory goals of promoting competition in telecommunications and affording all Americans access to the benefits of the Information Age at just, reasonable and affordable rates. In these comments, APPA focuses on one of these problem areas -- the Joint Board's suggestion that the Commission construe "as broadly as possible" the statutory terms "telecommunications carrier" and "telecommunications service."[1]

APPA submits the Joint Board's interpretation of these terms is inconsistent with the language and legislative history of the Telecommunications Act of 1996 and is contrary to the Commission's construction of these terms in its rulemaking on local competition. APPA further submits that it would be imprudent from a policy standpoint for the Commission to embrace the Joint Board's interpretation, as it would discourage electric utilities and other similarly-situated

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[1] APPA and its members are still attempting to understand and form consensus on various other major issues addressed in the Recommended Decision.

entities from making their telecommunications facilities available to potential providers of telecommunications service. Among other things, this would delay the realization of the Act's pro-competitive and universal-service goals and drive up the costs of telecommunications for all concerned. APPA therefore urges the Commission not to adopt the Joint Board's interpretation and to continue to adhere to its own construction of these terms.

INTEREST OF APPA

APPA is the national service organization for approximately 2000 consumer-owned electric utilities throughout the Nation, located in every state except Hawaii. For more than a century, consumer-owned electric utilities have played a vital role in furnishing essential local competition and universal service in the electric power industry. They are now well-situated to provide or facilitate local competition and universal service in the field of telecommunications.

Over the next few years, hundreds of consumer-owned electric utilities will need to upgrade their telecommunications infrastructure to support their core business of providing electric service at ever increasing levels of efficiency and reliability. The highly sophisticated telecommunications facilities that these utilities will need for their own purposes can support the provision of video, voice, data and other interactive telecommunications services by the electric utilities themselves or by other providers of such services.

By encouraging consumer-owned electric utilities to use their facilities in these ways, the Commission can simultaneously accelerate the pace of deployment of the National Information Infrastructure, promote and advance competition and universal service in telecommunications, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way. The Commission can also help preserve essential competition among consumer-owned and privately-owned providers of electric service.

APPA has participated in various rulemakings to implement the Telecommunications Act in order to help the Commission understand how its decisions may affect APPA's members. APPA is filing these comments because it believes that the Joint Board's interpretation of the terms "telecommunications carrier" and "telecommunications service" could have serious adverse effects on consumer-owned electric utilities, the communities that they serve, and the Nation as a whole.

DISCUSSION

I. THE TELECOMMUNICATIONS ACT AND THE COMMISSION'S OWN INTERCONNECTION ORDER ARE INCONSISTENT WITH THE JOINT BOARD'S INTERPRETATION OF THE TERMS "TELECOMMUNICATIONS CARRIER" AND "TELECOMMUNICATIONS SERVICE"

A. The Act and Its Legislative History

Critical to the operation of the Telecommunications Act of 1996 are the definitions of "telecommunications carrier" and "telecommunications service." The term "telecommunications carrier" is defined in 47 U.S.C. § 153(44) as "any provider of telecommunications service, " and the term "telecommunications service" is defined in 47 U.S.C. § 153(46) as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." These terms play a pivotal role in Sections 251 and 252, which allocate the benefits and burdens of the Act's interconnection requirements. They are used in Sections 254(e) and 214(e) to identify the entities that may qualify for universal service support. They are also used in Section 254(d) to identify the entities that must contribute to the Commission's universal service support mechanisms. Specifically, Section 254(d) states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable

and sufficient mechnisms established by the Commission to preserve and advance universal service."

In developing the Act's definitions "telecommunications carrier" and "telecommunications service," Congress consulted with APPA, UTC, The Telecommunications Association, and various other representatives of entities that require sophisticated telecommunications facilities for their internal purposes but have not engaged, and generally have no intention of engaging, in the provision of telecommunications services on a common carrier basis. Such entities include thousands of electric and gas utilties, rural electric cooperatives and railroads. In these consultations, Congress learned that it could advance the pro-competitive and universal-service goals of the Act by encouraging these entities to make their telecommunications facilities available to carriers of telecommunications service and that many of these entities would be willing to do so if they were assured that this would not subject them to the burdens that the Act imposes on carriers of telecommunications service.

Congress gave the necessary assurances by incorporating the limiting clauses "for a fee directly to the public" and "effectively available directly to the public" into the Act's definition of "telecommunications service." In doing so, Congress explained its intent as follows: "The term 'telecommunications service' is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services." Joint Explanatory Statement of the Conference Committee, S. Rep. No. 104-230, 104th Cong., 2d Sess. 115 (1996). By thus restricting the definition of "telecommunications service," Congress excluded most of the telecommunications activities in which members of APPA are likely to engage in the foreseeable future -- internal utility usage, assistance to other entities of local government, limited activities pursuant to contracts for private carriage, and leasing or selling

telecommunications infrastructure and facilities such as "dark fiber" to carriers of telecommunications service.[2]

B. The Commission's Interconnection Order

In its Interconnection Order implementing the local competition provisions of the Act,[3] the Commission began by embracing the statutory definitions of the terms "telecommunications carrier" and "telecommunications service," including the limiting clauses that Congess had inserted at the urging of APPA, UTC and others:

> A "telecommunications carrier" is defined [in the Act] as "any provider of telecommunications services . . . . A telecommunications carrier shall be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications services" . . .. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be as to be effectively available to the public. We conclude that to the extent a carrier is engaged in providing for a fee domestic or inter-national telecommunications, directly to the public or to such classes of users as to be effectively available to the public, the carrier falls within the definition of "telecommunications carrier."

Official Summary of First Report and Order ¶ 658, 61 Fed. Reg. 45,475 at 45,572 (August 29, 1996). The Commission then addressed the meaning of the term "for a fee." Noting that it had equated "profit" with "compensation" in the context of defining the term "Commercial Mobile Radio Service"

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[2] The legislative history of the nearly identical definition of "telecommunications service" in S.1822 in the prior Congress indicates that Congress did not intend the Act to apply to "the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services." S. Rep. No. 103-367, 103d Cong., 2d Sess. (September 14, 1994). In fact, Congress expressly stated that "[t]he offering by an electric utility of bulk fiber optic capacity (i.e., 'dark fiber') does not fall within the definition of telecommunications service." *Id.*

[3] First Report and Order on the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Docket No. 96-98, Issued August 8, 1996, corrected August 20, 1996.

in its *CMRS Second Report and Order*,[4] the Commission rejected that approach for the purposes of the 1996 Act:

> We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service." Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications" (the term "telecommunica-tions" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received" 47 U.S.C. § 153(43)) for a fee directly to the public or to such classes of users as to be effectively available directly to the public (*i.e.*, providing a telecommunications service), the operator is a telecommunications carrier and is subject to the duties in section 251(a).

Id. at ¶ 660, 61 Fed. Reg. at 45,573. The Commission thus made clear that a person receives a "fee" within the meaning of the 1996 Act only if he has crossed over the line between private carriage and common carriage by offering telecommunications "directly to the public or to such classes of users as to be effectively available directly to the public."[5]

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[4] *Implementation of Section 3(n) and 322 of the Communications Act*, Second Report and Order, GN Docket No. 93-252, 59 Fed. Reg. 18,493 (April 19, 1994).

[5] APPA has a filed a petition asking the Commission to make clear that the concluding sentence in ¶ 660 of its Official Summary of the First Report and Order should be read as though it included the italicized language: "Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks *for a fee directly to the public or to such class of users as to be effectively available directly to the public*), constitutes a telecommunications service and thus subjects the operator to the duties of section 251(a) to that extent."

II. THE JOINT BOARD'S INTERPRETATION OF THE TERMS "TELECOMMUNICATIONS CARRIER" AND "TELECOMMUNICATIONS SERVICE" IS INCORRECT

In its Recommended Decision, the Joint Board recognizes that Congress intended the terms "telecommunications carrier" and "telecommunications service" to reflect the distinction between services offered on a private basis and services offered on a common carrier basis. In fact, the Joint Board quotes the relevant language of the conference report cited above. Recommended Decision ¶ 779, quoting Joint Explanatory Statement of the Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 115 (1996). Furthermore, the Joint Board acknowledges that a "common carrier" has long been understood to mean a carrier that "undertakes to carry for all people indifferently." Recommended Decision at ¶ 155 n.511, quoting *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) and *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). Nevertheless, seeking to achieve the widest possible base of contributors to the Commission's universal service support mechanisms, the Joint Board urges the Commission to interpret the term "telecommunications service" as "broadly as possible." Recommended Decision ¶ 784.

First, the Joint Board urges the Commission to find that carriers that furnish wholesale services to other carriers are "telecommunications carrier[s]" under the Act and should be made to contribute to the Commission's universal service support mechanisms "because such carriers' activities are included in the phrase 'to such classes of eligible users as to be effectively available to a substantial portion of the public.'" Recommended Decision at ¶ 778, quoting *CMRS Second Report and Order* at ¶ 65. According to the Joint Board, the Commission interpreted this phrase in paragraph 68 of the *CMRS Second Report and Order* to mean "'systems not dedicated exclusively to internal use,' or systems that provide service to users other than significantly restricted classes."

Second, the Joint Board suggests that the Commission should reject UTC's position that the term "for a fee" means "for profit." Recommended Decision ¶ 789. Instead, the Joint Board recommends that the Commission read the term "fee" to mean "something of value or a monetary payment." *Id.* Doing so, the Joint Board observes, would enable the Commission to reach wholesalers and non-profit organizations. *Id.*

The Joint Board's approach is flawed in several respects. First, the Joint Board's heavy reliance upon the *CMRS Second Report and Order* is unwarranted. In that order, the Commission interpreted the phrase "to such classes of eligible users as to be effectively available to a substantial portion of the public," whereas here the Commission must interpret the phrase "to such classes of users as to be effectively available directly to the public." While these phrases use some of the same words, the former notably does not include the clause "directly to the public," with all the legislative history that this clause embodies. For this reason alone, comparisons should be drawn with caution.

Furthermore, the Joint Board has misinterpreted the *CMRS Second Report and Order*. Far from suggesting that the Commission should read the definitions in the 1996 Act broadly, that order counsels the opposite conclusion. In interpreting the term "to such classes of eligible users as to be effectively available to a substantial portion of the public," the Commission found that a service does not meet that definition "if it is provided solely for internal use or is offered only to a significantly restricted class of eligible users, as in the following services: (1) Public Safety Radio Services; (2) Special Emergency Radio Service; (3) Industrial Radio Services (except for Section 90.75, Business Radio Service); (4) Land Transportation Radio Services; (5) Radiolocation Services: (c) Maritime Service Stations; and (7) Aviation Service Stations." *CMRS Second Report and Order* at ¶ 65 (footnotes omitted). Services such as those listed were not covered, the Commission concluded, because they are "made available on only a limited basis to insubstantial portions of the public." "In

contrast," the Commission added, Business Radio Service was "effectively available to a substantial portion of the public" because it was offered on a "virtually unrestricted" basis, with eligible users generally including "any persons engaged in the operation of commercial activities, educational, philanthropic, or ecclesiastical institutions, clergy activities, and hospitals, clinics, or medical associations." *Id.* at ¶ 68.

In the *CMRS Second Report and Order*, the Commission thus distinguished between limited and unrestricted offerings, finding that only the latter constitute services that are "effectively available to a substantial portion of the public." Since "virtually unrestricted offerings" are the hallmarks of common carriage, the Commission's test would lead to essentially the same result as Congress contemplated in the 1996 Act when it limited the definition of "telecommunications service" to service provided on a common carrier basis.

The Joint Board is also incorrect in suggesting that the Commission should equate the term "fee" with "something of value or a monetary payment." The Joint Board fails to appreciate that the term "for a fee" does not exist in isolation in the 1996 Act but is modified by the phrase "directly to the public." Congress selected these words carefully to ensure that the only compensation covered by the Act would be compensation received for the provision of telecommunications services on a common carrier basis. Moreover, as discussed above, the Commission correctly rejected this approach in its Interconnection Order and should do the same here.

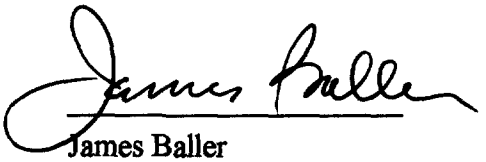
III. THE JOINT BOARD'S INTERPRETATION OF THE TERMS "TELECOMMUNICATIONS CARRIER" AND "TELECOMMUNICATIONS SERVICE" WOULD BE IMPRUDENT FROM A POLICY STANDPOINT

Legal requirements aside, the Commission should decline to adopt the Joint Board's broad interpretation of the terms "telecommunications carrier" and "telecommunications service" because it would have serious adverse consequences. By discouraging electric utilities and other entities from

making their telecommunications facilities available to persons who would use them to provide telecommunications service on a common carrier basis, such an interpretation would delay the fulfillment of the pro-competitive and universal-service goals of the Act, drive up the costs of telecommunications for all concerned and place unnecessary burdens on the environment. It would retard the pace of economic, educational and cultural development in countless communities. It could also adversely affect prices, quality of service and competition in the electric industry.

To avoid these consequences, the Commission need do no more than continue to interpret the terms "telecommunications carrier" and "telecommunications service" as it has previously interpreted them in the Interconnection Order. That is the course that APPA recommends.

Respectfully submitted,



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